United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

ORIGINAL

74-1661

Nos. 206, 339, 340—September Term, 1974
(Argued November 26, 1974 Decided September 9, 1975.)
Docket Nos. 74-1661, 74-1699, 74-1706

United States Court of Appeals

FOR THE SECOND CIRCUIT

FABRIZIO & MARTIN, INCORPORATED,
Plaintiff-Appellee-Appellant,

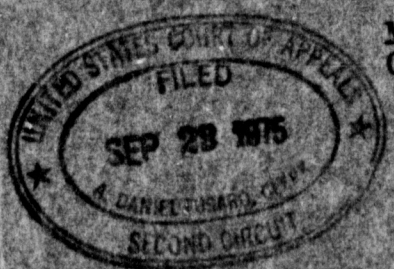
v.

BOARD OF EDUCATION CENTRAL SCHOOL DISTRICT NO. 2 OF THE TOWNS OF BEDFORD, NEW CASTLE, NORTH CASTLE and POUND RIDGE, MARS ASSOCIATES, INC., and NORMEL CONSTRUCTION CORP. OF NEW ROCHELLE, a joint venture,
Defendant,

THE BOARD OF EDUCATION CENTRAL SCHOOL DISTRICT NO. 2 OF THE TOWNS OF BEDFORD, NEW CASTLE, NORTH CASTLE and POUND RIDGE,
Defendant-Appellant-Appellee,

AETNA CASUALTY & SURETY CO., Additional Defendant on the Counterclaim of Defendant Board of Education,
Defendant-Appellee-Appellant.

PETITION FOR CLARIFICATION AND REHEARING



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THE BOARD OF EDUCATION CENTRAL SCHOOL DISTRICT NO. 2 OF THE TOWNS OF BEDFORD, NEW CASTLE, NORTH CASTLE and POUND RIDGE,

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AETNA CASUALTY & SURETY CO., Additional Defendant on the Counterclaim of Defendant Board of Education,

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PETITION FOR CLARIFICATION AND REHEARING

Aetna Defendant-Appellee-Appellant respectfully petitions this Honorable Court for (1) a clarification of its decision dated September 9, 1975, (2) a rehearing of the appeal or (3) a rehearing en Banc, and in support of this petition represents to the Court as follows:

This Court in its decision in the printed form on page 5988 noted that:

> "Fabrizio and Aetna offered to complete [the construction]. The Board refused to accept the offer. Fabrizio performed extra work not contemplated by the original contract . . ."

That finding might be construed contradictory to this Court's observation that Fabrizio "walked off the job". If the "walking off" was caused by the Board's breach or anticipatory breach of its obligations to Fabrizio then, clearly, Fabrizio should be able to prove all of its damages caused by that breach.

In support of Fabrizio's position Judge Carter found the following facts which this Court characterized as "virtually undisputed" (5975).

"Construction began and dispute arose from almost the outset. The Board was slow in paying the monthly requisition which the contract called for. It delayed executing change orders with promptness and failed to make payments for work completed as prescribed and refused to allow extensions when extra work was required. Differences between the parties continued to magnify, and on March 2, 1966 Fabrizio advised the Board that it was terminating the contract. On April 5, 1966 the Board, Fabrizio and Aetna met to seek to determine whether their differences could be ironed out. Aetna proposed a solution and Fabrizio agreed that if that solution was acceptable, it would complete construction by July, 1966. The Board, however, decided to secure another contractor to complete construction and awarded the contract to complete construction to Mars Normel" (record at 1057a-1058a).

This Court remanded the case for proof of damages and it is not quite clear that Fabrizio is entitled to prove damages for breach of contract which he was prevented from proving initially because all Courts, including this Honorable Court, have heretofore proceeded on the erroneous assumption that the basic contract between Fabrizio and the Board was illegal and void for violation of the bidding statute, sec. 103 N.Y. General Municipal Law.

Fabrizio alleged breach of contract in the First, Third and Fourth causes of the complaint as referred to in the printed decision on page 5979, but consented to their dismissal on the basis of an initial holding that the contract was illegal and void (p. 5983 id.).

It should be noted that this case was previously before this Honorable Court and on two previous occasions. While the issue of legality was not directly tested there was tacit understanding that the contract was illegal.

In the light of the present decision by this Court that the contract is legal and enforceable it should be made clear that Fabrizio's causes of action for breach of contract are restored and that it may prove damages under the First, Third and Fourth causes as well as the remaining causes.

The Court should grant a rehearing as to the issue of the legality of the contract because of the confusion arising out of the seemingly conflicting decisions, in this case, bearing in mind the established law of New York.

Section 103 N.Y. General Municipal Law which is quoted verbatim on p. 5975 of the printed decision, as construed by the New York Courts does not permit a public agency to accommodate a low bidder by changing the scope of the construction project so as to compensate him for an error made in his bid. Indeed, Judge McLean in this

case noted that "A contract made by a board of education in violation of the competitive bidding requirements of this section is void," citing New York authorities. Judge McLean continued "This principle was established many years ago with respect to similar statutes requiring competitive bidding on municipal contracts" again citing authorities. Judge McLean asserted: "A municipal corporation, bound by the statutory competitive bidding requirement, is not free as a private individual is to change its mind and to negotiate a new deal whenever it sees fit." *Fabrizio & Martin, Inc.* v. *The Board of Education, etc.,* Docket No. 66 Civ. 2935, Motion No. 86 (S.D.N.Y. Feb. 21, 1967). Judge McLean also quoted from *Grace* v. *Forbes,* 64 Misc. 130, 133, 118 N.Y. Supp. 1062, 1067 (Sup. Ct. 1909) the following:

> "In other words, the spirit of the statute requires that the plan of the work to be done be adopted before proposals are invited to the end that all bids may be for the same thing, and that nothing may remain to be determined by the board but the question as to which figures are the lowest. The statute implies a common standard by which bidders are to be measured. It implies plans previously adopted, which are to be open to all. It implies a chance to bid for a contract which is to be adopted; not that a contract may be adopted, after bids are in, and in view of them."

Bearing in mind the importance of clarity of the prevailing law in connection with bidding by contractors on public construction and considering the huge industry involved it is imperative that this Honorable Court grant a rehearing of the appeal as to the issue of the legality of the basic contract between Fabrizio and the Board.

There is of course the collateral issue of tremendous importance to the Surety business namely whether a performance bond is enforceable despite the fact that the basic contract is illegal and void. Incidentally the record in this case established beyond doubt that Aetna, the Surety herein had no knowledge of the facts which rendered the basic contract void nor did it participate in any agreement which could impute such knowledge. In these circumstances it is respectfully requested that a rehearing en Banc be granted.

Respectfully submitted,

MAX E. GREENBERG, TRAYMAN, HARRIS, CANTOR, REISS & BLASKY,
Attorneys for Defendant-Appellee-Appellant.

Services of three (3) copies of
the within Petition for Certiorari
is
hereby admitted this 23rd day
of September, 1975

Louis E. Garner

Attorney for